



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the
Request for Opinion concerning
the conduct of PHIL SALERNO,
Councilman, City of Sparks,
State of Nevada,

Request for Opinion No.: 08-05C

Public Officer.

REPORT AND RECOMMENDATION REGARDING JUST AND SUFFICIENT CAUSE

Report and Recommendations (Tab A):

INVESTIGATOR'S REPORT

Introduction

An ethics complaint was filed against Phil Salerno (Salerno). He has been a member of the Sparks City Council (City Council) since June 1995. He is the owner of Grand Abacus, Inc., doing business as Nevada Forms and Printing (Nevada Forms) and has been in business since 1993.

In his capacity as a member of the City Council, Salerno is a public officer as defined by NRS 281A.160. Therefore, the Nevada Commission on Ethics has jurisdiction over him.

This report is timely completed because Salerno submitted his *Waiver of Statutory Time Requirement* on March 18, 2008.

At all relevant times, Salerno's Nevada Forms had a business relationship with John Ascuaga's Nugget (Nugget). For example, the Nugget paid Nevada Business Forms more than \$59,000 in 2005, \$85,000 in 2006, and \$114,000 in 2007. Salerno also had a business relationship with the Western Village owned by the Peppermill Casino since he started his business.

- On February 16, 2005, Red Hawk Land Company, LLC, owned by Harvey Whittemore (Whittemore), submitted an application to the City of Sparks that

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would permit him to build a hotel/casino closer to the Nugget. This project was the Tierra del Sol Planned Development, also known as the Lazy 8 project (Lazy 8).

- The Nugget and a citizen-group allegedly funded by the Nugget opposed the Lazy 8 application. Their belief was that the construction of the Lazy 8 casino in Sparks would have a negative economic impact on the Nugget.

Pursuant to NAC 281A.415, on May 29, 2008, an Additional Notice of Issues and Facts was issued by the Executive Director of the Nevada Commission on Ethics alleging that Salerno violated:

- NRS 281A.420.2 when he acted on the Lazy 8 despite his commitment in a private capacity to the Peppermill.
- NRS 281A.420.4 when he failed to disclose the potential conflict of his financial relationship with and his commitment in a private capacity to the interests of the Peppermill at the August 23, 2006 meeting.

Request for Opinion (Ethics Complaint) (Tab B):

On March 6, 2008, a Request for Opinion (Ethics Complaint) was received from Harvey Whittemore.

The following is the substance of the complaint:

On August 23, 2006, the Lazy 8 application came before the City Council for approval. During the hearing, the Nugget opposed the Lazy 8 application. Salerno did not disclose his financial relationship and commitment in a private capacity to the Nugget nor did he abstain from voting on the application.

On August 25, 2006, Red Hawk filed a lawsuit against the City of Sparks for breach of the 1994 Development Agreement (Wingfield Springs) that Whittemore argued permitted him to transfer his rights to the Lazy 8 property. Subsequently, an agreement was proposed to settle the lawsuit.

The Nugget opposed the settlement agreement. On September 20, 2006, Salerno voted against the settlement agreement. Prior to voting against the settlement agreement, Salerno failed to disclose his relationship with the Nugget.

On August 27, 2007, the City Council heard the Lazy 8 application for a second time. Salerno disclosed that his Nevada Forms did business with the Nugget. Salerno did not abstain and again voted to deny the Lazy 8 application.

The complaint alleged that Salerno violated:

- NRS 281A.400.1 when he accepted employment and economic opportunity from the Nugget that influenced him to vote against approval of the Lazy 8.
- NRS 281A.400.2 when he used his position to secure and increase business for himself and his company when he voted against the Lazy 8.

- NRS 281A.420.2 when he acted upon the Lazy 8 despite his commitment to the Nugget.
- NRS 281A.420.4 when he failed to disclose the potential conflict of his financial relationship with and his commitment in a private capacity to the Nugget at the August 23, 2006 meeting.

Responses (Tab C):

On April 11, 2008, a Response was received from Salerno's attorney. The following is the substance of the response:

Salerno did not violate any provision of Nevada's Ethics in Government Law. The small amount of business Nevada Forms did with the Nugget did not improperly influence Salerno's faithful discharge of his office. Furthermore, a reasonable person's independence of judgment would not be affected by the relatively insignificant amount of business done by Nevada Forms with the Nugget.

Salerno argued that the Request for Opinion was filed in an attempt to gain a tactical advantage in the many ongoing lawsuits surrounding this dispute.

In response to the Notice of Additional Issues and Facts, on June 12, 2008 Salerno submitted the following information.

Western Village ordered its printing work through the Peppermill, so records for both of these casinos are kept in the name of the Peppermill. The Peppermill itself has not done any business with Nevada Forms since 2002. Western Village did business with Nevada Forms until Salerno voted against the Lazy 8.

Salerno's business with each entity has fluctuated up and down over the years, but the Nugget, the Peppermill and the Western Village are part of a portfolio of approximately 600 other customers. For the past eight years, the overall average of Nevada Forms' income business with the Nugget was 12.61% and Peppermill was 5.86%.

According to Salerno he had not discussed the Lazy 8 with any of his customers prior to the August 23, 2006 meeting. Therefore, he states that he was unaware that the Nugget was opposing the Lazy 8 and did not have any knowledge of whether they were involved in organizing opposition to the project.

Salerno also states that Nevada Forms does not have separate contracts for any of its customers. The majority of business is quoted and awarded on a competitive bid basis with the low bidder winning the contract.

Only relevant documents and/or portions of documents from Salerno's Responses are found under Tab C. The entire response is available upon request and will be available at the panel proceeding.

Relevant Statutes and Commission Opinions are found in Tab D:

Investigation Summary (Tab E):

In addition to the review of the above-mentioned documents, the investigator researched and reviewed following documents:

- Lazy 8 Historical Timeline.
- Tierra del Sol handbook amendment.
- August 17, 2006, Legal Memorandum issued by the Sparks City Attorney to the Sparks City Council members regarding bias or predisposition as grounds for disqualification of elected official.
- Minutes for:
 - City of Sparks Planning Commission held on July 6-7, 2006; and
 - Special Meeting of Sparks City Council held on September 20, 2006.
- Process flow chart for Tentative Planned Development Handbook applications.
- Relevant portions of Sparks Master Plan relating to Tourist Commercial Zoning.
- Secretary of State records regarding:
 - Red Hawk Land Company, LLC;
 - Wingfield Nevada Group Holding Company, LLC;
 - Peppermill Casinos, Inc.; and
 - Grand Abacus, Inc.
- Washoe County Fictitious name filings regarding Nevada Forms & Printing Company.
- Press releases from City of Sparks website and news articles relating to the Lazy 8.
- Investigative questions sent to Salerno dated May 16, 2008.
- Salerno's response to investigative questions dated May 22, 2008.

Investigative Findings:

One item on the City Council's agenda of August 23, 2006 was an application of Red Hawk Land Development to amend the handbook for Tierra del Sol Planned Development. The amendment was necessary for the Lazy 8 project to move forward. The application being considered did not name the Peppermill. The records obtained from the City of Sparks did not reveal the relationship between Red Hawk Land Development, LLC and Peppermill.

When the Red Hawk representative appeared before the City Council he stated that he represented Red Hawk *and* the Peppermill. All news articles leading up to the date of the hearing reported that the Lazy 8 project would be developed by Peppermill and Whittemore. Wingfield Nevada Group Holding Company, LLC is comprised of Whittemore, Albert Seeno and Thomas Seeno. Albert and Thomas Seeno are directors in Peppermill Casinos, Inc.

Approximately one week prior to the meeting, the City Attorney's office advised each City Council member to consider their personal relationships, err on the side of caution and disclose sufficient information concerning these relationships before voting on issues.

According to the minutes of the August 23, 2008 City Council meeting, Salerno did not disclose regarding his business relationship with the Peppermill or the Nugget when the matter regarding the Lazy 8 casino was heard. Salerno voted with the majority (3/2 vote) to deny the handbook amendment proposed by Red Hawk Land Company, L.L.C.

The August 23, 2006 minutes also show that there were approximately 40 individuals that made public comment in opposition to the Lazy 8 project. Among those speaking in opposition to the project were representatives of the Nugget. Salerno states that he was unaware of the Nugget's position regarding the Lazy 8 prior to the hearing and was unaware that the Nugget had allegedly organized and funded a group of citizens to oppose the Lazy 8 casino. The public comment was heard prior to the vote. According to press releases and media sources the opposition was well known.

According to the minutes of the September 20, 2006 City Council meeting, there were comments from the public prior to a vote on an agenda item relating to whether to settle a lawsuit with Red Hawk. Salerno did make a disclosure regarding his business relationship with the Peppermill or the Nugget prior to voting with the minority (3/2 vote) against a motion to authorize the City Attorney's office to negotiate a settlement with Red Hawk.

On August 27, 2007, the City Council held a meeting to consider three agenda items necessary to approve the Lazy 8. Public comment was heard prior to the vote on each individual agenda item and the representatives for the Nugget opposed the three agenda items. Before the vote, Salerno disclosed that his company did business with the Nugget. Salerno voted for one and against the other two agenda items.

At the time of the August 23, 2006, September 20, 2006 and August 27, 2007 meetings, Salerno's business, Nevada Forms, had a business relationship with Western Village through the Peppermill. Over the seven years worth of data reported the combined income from Western Village/Peppermill represented an average of 5.86% per year of overall income for Nevada Forms.

The Nugget represented an average of approximately 12.61% of the overall business for Nevada Forms over the past eight years. Salerno had already sought and secured the business from the Nugget and based upon the accounting records they had remained a consistent customer to him over the past eight years. At the time of the August 23, 2006, September 20, 2006 and August 27, 2007 meetings, Salerno's business, Nevada Forms, had a business relationship with the Nugget.

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There is no evidence that would suggest that Salerno would have experienced an increase or decrease in his business with the Nugget based upon the outcome of his vote on the Lazy 8 project. No evidence was uncovered to substantiate the fact that Salerno used his position to secure an unwarranted privilege for his client the Nugget when he cast his vote to deny the Lazy 8 project.

Investigator's Report Prepared by:

_____ Dated: _____
Tami E. DeVries
Research Analyst/Acting Investigator

EXECUTIVE DIRECTOR'S RECOMMENDATION

The following is the Executive Director's recommendation based on the Acting Investigator's report.

Analysis and Recommendation:

Each allegation of a violation is analyzed as follows:

Did Salerno violate NRS 281A.400.1 when he allegedly accepted employment or economic opportunity from the Nugget that improperly influenced him to vote against approval of the Lazy 8?

The evidence does not show that Salerno sought or accepted any employment, emolument or economic opportunity, which would tend to improperly influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties. Salerno secured the Nugget's business well in advance of his vote on the Lazy 8. The Nugget is one of Nevada Forms' 600 customers and has been a customer over the past eight years. The percentage of the business between the parties has fluctuated but has been fairly consistent over the years. (Tab C, Response, p.4)

Therefore, on the allegation that he gained employment or an economic advantage based on his business relationship with the Nugget which improperly influenced him to vote against the Lazy 8, the recommendation is that the Panel find that just and sufficient cause **DOES NOT EXIST** for the Commission to hold a hearing and render an opinion on whether Salerno violated NRS 281A.400.1.

Did Salerno violate NRS 281A.400.2 when he allegedly used his position to secure and increase business advantages for himself and/or his company, Nevada Forms, when he voted against the Lazy 8?

The evidence does not show that Salerno secured an unwarranted privilege, or advantage for himself or his business when he voted against the Lazy 8. According to the Nevada Forms' accounting records, the percentage of the business with the Nugget remained fairly consistent and the company did not receive an increase in business because of his vote. (Tab C, Response, p. 4)

Therefore, on the allegation that he used his position to secure increased business for himself and/or his company when he voted against the Lazy 8, the recommendation is that the Panel find that just and sufficient cause **DOES NOT EXIST** for the Commission to hold a hearing and render an opinion on whether Salerno violated NRS 281A.400.2.

Did Salerno violate NRS 281A.420.2 when he allegedly voted on the Lazy 8 when he had a private commitment to the interests of the Nugget?

In order to determine whether just and sufficient cause exists that Salerno violated NRS 281A.420.2, the Panel must find that the amount of business that Salerno did with the Nugget is

so significant that a reasonable person's independent judgment would be affected when voting on the Lazy 8. Of Nevada Forms' 600 customers, the Nugget's business averaged 12.61% of Nevada Forms business from 2000-2007. (Tab C, Response, p. 4) Ten percent of a business' income from one source appears to be a significant amount of business.

Therefore, on the allegation that Salerno should not have voted on the Lazy 8 project on August 23, 2006, September 20, 2006 and August 27, 2007 because of his private commitment to the Nugget, the recommendation is that the Panel find that just and sufficient cause **DOES EXIST** for the Commission to hold a hearing and render an opinion on whether Salerno violated NRS 281A.420.2.

Did Salerno violate NRS 281A.420.4 when he allegedly failed to disclose his private commitment to the Nugget and failed to abstain at the August 23, 2006 City Council meeting?

The evidence shows that Salerno was advised about disclosing personal relationships before the August 23, 2006 meeting. Public officers must sufficiently disclose private commitments before voting when the officer has a private commitment to another. Approximately one week prior to the meeting, the City Attorney's office advised City Council members to consider their personal relationships, err on the side of caution and disclose sufficient information concerning these relationships before voting on issues. (Tab E, August 17, 2006 Legal Memo)

On August 23, 2006, during the Public Comment section of meeting, the Nugget along with many other members of the public expressed their opposition to the approval of the Lazy 8. (Tab B, Complaint, Exhibit C) Salerno states that he was unaware of the Nugget's opposition to the Lazy 8 prior to the meeting. And he was unaware that the Nugget had allegedly organized a group of citizens to oppose the Lazy 8.

The Public Comment section was heard prior to the Lazy 8 vote. Since Salerno had notice of the Nugget's opposition to the Lazy 8, he should have disclosed his business relationship with the Nugget and abstained from voting when he became aware of its opposition.

On the issue of disclosure and abstention, the recommendation is that the Panel find that just and sufficient cause **DOES EXIST** for the Commission to hold a hearing and render an opinion on whether Salerno violated NRS 281A.420.4.

Did Salerno violate NRS 281A.420.2 when he allegedly voted on the Lazy 8 when he had a business relationship and private commitment to the Peppermill?

On the August 23, 2006 agenda was an application of Red Hawk Land Development to benefit the Lazy 8. Public officers may not vote on matters where a reasonable person's judgment would be affected because of a private commitment.

When the Red Hawk representative appeared before the City Council he stated that he represented Red Hawk *and* the Peppermill. (Tab B, August 23, 2006 minutes) Wingfield Nevada Group Holding Company, LLC is comprised of Whittemore, Albert Seeno and Thomas Seeno. Albert and Thomas Seeno are directors in Peppermill Casinos, Inc. All news articles leading up

to the date of the hearing make statements that the Lazy 8 will be developed by the Peppermill and Whittemore.

The evidence shows that Salerno had a significant, ongoing and continuing business relationship with Western Village through the Peppermill for several years. Salerno voted against the Lazy 8 owned by Whittemore a business partner of the Peppermill. Since the Western Village/Peppermill represents an average of 5.86% of his Nevada Forms business, Salerno's vote was against his own private commitment. (Tab E, Letter from Salerno to DeVries dated May 22, 2008)

Salerno also voted against the Lazy 8 on September 20, 2006 and August 27, 2007.

Therefore, on the allegation that Salerno should not have voted on the Lazy 8 project because of his private commitment to the Peppermill, the recommendation is that the Panel find that just and sufficient cause **DOES NOT EXIST** for the Commission to hold a hearing and render an opinion on whether Salerno violated NRS 281A.420.2.

Did Salerno violate NRS 281A.420.4 when he allegedly failed to disclose his financial relationship with and his private commitment to the Peppermill at the August 23, 2006 meeting?

The evidence on this allegation is the same as the allegation of a violation of NRS 281A.420.2. Even though Salerno voted against the Peppermill and the Lazy 8, at a minimum, Salerno should have disclosed his private commitment to the Peppermill before he voted on August 23, 2006, September 20, 2006 and August 27, 2007. The public should have been put on notice that Salerno was supporting one of his customers over another.

On the issue of disclosure, the recommendation is that the Panel find that just and sufficient cause **DOES EXIST** for the Commission to hold a hearing and render an opinion on whether Salerno violated NRS 281A.420.4.

Conclusion :

Just and sufficient cause **DOES EXIST** for the Commission to hold a hearing and render an opinion on the allegations against Salerno as outlined above.

Only the full Commission has the authority to determine if his conduct in relation to these issues rises to the level of a violation of state law.

Approval of Investigator's Report and Recommendation by:

 Dated: July 15, 2008
Patricia D. Cafferata, Esq.
Executive Director